NO. 44154-3-II
(consolidated with 45264-2-II)

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

JEREMY GOODSON,
DBA GOODSON PROPERTIES,

Respondent,

vs.

KATALIN K. NYITRAI,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated CR 2A and acted without authority when it entered an "agreed" order of settlement that did not bear the signature of the defendant or her attorney.

2. The trial court abused its discretion when it entered an "agreed" order of settlement that did not correctly state the substance of the prior agreement.

3. The agreed order of settlement violated the statute of frauds and is void because by its terms it could not be performed in one year and it did not bear the signature of either the appellant or her attorney.

Issues Pertaining to Assignment of Error

1. Does a trial court violate CR 2A and act without authority if it signs an "agreed" order of settlement when that proposed order does not bear the signature of the defendant or her attorney, when plaintiff's attorney informs the court that defendant's attorney refused to sign it and when neither the defendant nor her attorney are present in court when the document is presented for signature?

2. Does a trial court abuse its discretion if it enters an "agreed" order of settlement that does not bear the signatures of both parties and that did not correctly state the substance of a proposed oral agreement that the parties had previously orally outlined in court?

3. Does an agreed order of settlement violate the statute of frauds and is it thereby void if by its terms it can not be performed in one year and it does not bear the signature of a party thereto or that party's attorney?

STATEMENT OF THE CASE

On February 29, 2012, Respondent Jeremy Goodson (Goodson) doing business as Goodson Properties served and filed a summons and complaint against Appellant Katalin Kish Nyitrai (Nyitrai) alleging that she had reneged on purchase and sale agreements for three properties Ms Nyitrai owns in Longview, Washington. CP 1-62[1]. The prayer for relief on the complaint requested specific performance on the three purchase and sale agreements, costs, and attorneys fees. *Id.* Two months later the court entered an Order of Default as Nyitrai had filed no appearance or answer in the case. CP 63-68. Five days later counsel for Nyitrai entered an answer denying the material allegations in the complaint and alleging a number of affirmative defenses. CP 69-72. The court subsequently entered an order Vacating the Default Judgment, and set the matter for a bench trial on August 20, 2012. CP 73-75.

On the day of trial the parties appeared and informed the court that they had come to a proposed settlement which resolved the suit currently pending before the court and would also include an agreement for Goodson

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[1]Clerk's Papers in No. 44154-3-II run from pages 1 through 87. Clerk's Papers in No. 45264-2-II (consolidated with the former appeal) include each of the documents contained in the first appeal (except the Notice of Appeal) plus further documents. As a result, all references to Clerk's Papers in this brief refer to Clerk's Papers filed in the latter case.

in his individual capacity to purchase a fourth adjoining property owned by Nyitrai. RP 1-7[2]. Goodson's attorney Kenneth Hoffman outlined the first part of this agreement for the court as follows:

> MR. HOFFMAN: Your Honor, the parties have agreed to settle the case and I'll be in trial today. On the terms, as I understand, we are going to follow the order, we're going to basically reinstate the order of default and judgment that was entered on April 6th, 2012 of this year. Except that the attorneys fee award, will be – will not be included.
>
> JUDGE BASHOR: Okay.
>
> MR. HOFFMAN: The parties have settled this, the parties will recover their own – their own – their own legal fees.
>
> JUDGE BASHOR: Let me get to that and make – make sure.
>
> MR. HOFFMAN: So the terms of this order were fashioned with the assistance of Cowlitz County Title Company, they have structured closing based on this order, and we would like to minimize their difficulty by letting them continue with – with what they have set up here.
>
> JUDGE BASHOR: I see. All right.

RP 1-2.

Goodson's attorney then outlined the second half of the agreement for the court which was for Nyitrai to sell a fourth adjoining property to Goodson. RP 3-4. He stated as follows on the terms of the second half of the agreement for the sale of the property that was not part of the original lawsuit:

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[2]The record on appeal includes one volume of continuously numbered verbatim reports of the hearing held on 8/20/13, 9/18/12, 3/1/13, and 6/14/13.

MR. HOFFMAN: So that will take care of the three properties that were at issue in this case and the specific performance of which was to be determined by this Court. There was a fourth property which was kind of part of the overall problem, at least, from the Defendant's perspective

JUDGE BASHOR: Uh-huh.

MR. HOFFMAN: And the parties have settled, agreed to settle that one as well if that settles in premise on the sale of the fourth property commonly known as 1917 33rd Street.

MR. HARKER: It's kind of – sorry – (inaudible).

MR. HOFFMAN: I'm sorry, is it avenue? My apologies, Your Honor, 33rd Avenue.

JUDGE BASHOR: Okay.

MR. HOFFMAN: A legal description will be provided later.

JUDGE BASHOR: Okay.

MR. HOFFMAN: But the terms of the sale are from Jeremy Goodson individually. I'm sorry – and Katalin Nyitrai as seller, selling to Jeremy Goodson as an individual for the total purchase price of $185,000.00. From that $185,000.00, Mr. Goodson will be responsible for all closing costs coming out of that. That was we put down enough money to cover the closing costs.

JUDGE BASHOR: Okay.

MR. HOFFMAN: The rest will be paid by a promissory note and deed of trust. A note will carry interest at 7%. There will be a $40,000.00 principle payment at the end of one year, and each year succeeding, is that right? And the note will be paid in full within five years. Mr. Goodson will also be entitled to a $5000.00 commission, as he was entitled in the three – other three contracts which were the subject of this – this legal action. Parties will bear their own costs, legal fees and Mr. Harker's office would like the opportunity to read their review what the Title Company has done, or prepare the note

and deed of trust to be sure that their sentence (inaudible). Would like –

JUDGE BASHOR: Uh-huh.

MR. HOFFMAN: It would be in their client's best interest.

JUDGE BASHOR: All right. Counsel is that your understanding of the agreement?

MR. HARKER: It is, Your Honor.

RP 2-4.

At this point Nyitrai's attorney Kevin Harker clarified for the court and opposing counsel that under the agreement he wanted his office to prepare all of the documents required for the second half of the agreement, which was the sale of the fourth property. RP 4-5. Goodson's attorney responded that he would agree to this proposal. RP 5. This exchange went as follows:

MR. HARKER: A couple of other things, our – our office will turn around the documents for the fourth property as well as have a review done.

MR. HOFFMAN: Yes. (Inaudible)?

MR. HARKER: This – so I was saying our office will prepare the documents for the fourth property as well as have the review of the other documents that have been prepared and get comments, or any request for modifications to you guys within, let's just say, 72 hours just to be safe. Closing no later than 30 days from that day.

MR. HOFFMAN: Okay, that's fine.

CP 4-5.

Goodson's attorney then stated that while his client was going to pay all closing costs, those costs would be deducted from the agreed upon sales price for the fourth property. RP 5-6. This exchange went as follows:

> MR. HOFFMAN: And, I'm sorry, did – may I make it clear, Your Honor, that Mr. Goodson's covering the closing costs, what is equivalent of the down payment toward the $185,000.00 purchase price?
>
> JUDGE BASHOR: So, essentially, he's paying the $185,000.00 plus closing costs?
>
> MR. HOFFMAN: No.
>
> JUDGE BASHOR: Then he –
>
> MR. HOFFMAN: $185,000.00 incorporates the closing costs.
>
> JUDGE BASHOR: Okay.
>
> MR. HOFFMAN: Closing costs would be a down payment toward the $185,000.00.
>
> JUDGE BASHOR: I see. Okay. So, whatever the closing costs are, he's going to put that down, the balance will be on the note?

RP 5-6.

Nyitrai's attorney then stated that this was his understanding of the proposed settlement. RP 6.

Goodson's attorney subsequently prepared a proposed "Settlement Agreement, Order Quieting Title and Dismissal" and noted the case for presentation of that document on September 18, 2012. CP 76-80. Although

Goodson's attorney appeared before the court on the date indicated, Nyitrai and her attorney did not. RP 8-9. At that time Goodson's attorney informed the court that Nyitrai's attorney had not signed off on Goodson's proposed settlement agreement. *Id.* This exchange went as follows:

> MR. HOFFMAN: Your Honor, may it please the Court, I believe I am number 2, uncontested. I've been in touch with – tried to be in touch with Mr. Harker. I've sent him papers for the last several weeks, there were several minor adjustments, including comments from credit companies, I've kept him in touch with all of these. Asked him to please respond in some fashion, I heard from him – what – recently as this morning, he said he would call me and discuss it, but he – this morning he – and he did not.
>
> JUDGE BASHOR: It will –
>
> MR. HOFFMAN: He's given me no written objection, no written comments.
>
> JUDGE BASHOR: Okay. And it was noted on for today?
>
> MR. HOFFMAN: And it was – pardon me?
>
> JUDGE BASHOR: It was noted on for today?
>
> MR. HOFFMAN: Noted on for today, yes, actually it was noted on the 2nd – I'm sorry, the 4th.
>
> JUDGE BASHOR: Right.
>
> MR. HOFFMAN: But you were unavailable.
>
> JUDGE BASHOR: Got it.
>
> MR. HOFFMAN: So we – he had even an extra two weeks to discuss the matter with his client and still no – no comments, no objections.

JUDGE BASHOR: Okay.

MR. HOFFMAN: So, we have nothing that reasonably (inaudible).

JUDGE BASHOR: I've signed the order.

RP 8-9.

The document Judge Bashor signed was entitled "Settlement Agreement, Order Quieting Title and Dismissal." CP 85. It states as follows:

I. SETTLEMENT AGREEMENT

THIS MATTER was originally set for trial on Monday, August 20th, 2012. Immediately prior to trial, the parties reached a settlement, which resolved most all of the issues in the case. The terms of the settlement were put on the record and here follows their written embodiment:

1. Title to the three parcels of real property subject to this action, commonly known as: 1924 Dorothy Street, Longview, WA: 1921 33rd Avenue, Longview, WA; and 1920 Dorothy Street, Longview, WA; shall transfer from KATALIN KISH NYITRAI and be quieted in JEREMY GOODSON, or his assigns, pursuant to the terms set forth in this Court's order dated April 6th, 2012, which order is hereby reinstated, with the following modifications:

a. The attorneys fee provision, but not the costs, will be stricken. Each party will be responsible for his and her own attorneys fees incurred in this matter.

b. Payments and interest under all the three notes shall begin commensurate with the closing of 1917 33rd Ave. below.

2. KATALIN NYITRAI will warrant and convey to JEREMY GOODSON individually, here interest in and to a fourth real property, whose legal description is attached, but which is commonly known as 1917 33rd Avenue in Cowlitz County, Washington.

3. In return, JEREMY GOODSON, individually, agrees to pay to

MS. NYITRAI the total sum of $185,000.00 under the following terms:

a. A down payment equal to all seller's closing costs as determined by Cowlitz County Title Company.

b. The balance evidence by a promissory note and deed of trust, to be prepared by Cowlitz County Title Company, subject to both parties' review and approval, which note shall bear interest at 7% per annum, and provide for principal payments of $40,000.00 due annually on the anniversary of the date of closing.

c. The note is due in full five years from the date of closing.

d. JEREMY GOODSON will receive a commission of $5,000.00 to be paid out of future note payments in similar fashion to paragraph 7 of the Court's order dated April 6th, 2012.

e. Closing shall occur no later than thirty days from the date of this order.

4. Rents have been accumulating on the three properties subject to the April 6th, 2012 order. These rents should have gone to JEREMY GOODSON had closing taken place on December 31st, 2011 as originally agreed and, in any event, subject to April 6th, 2012. JEREMY GOODSON is entitled to all rents collected by Sharp Property Management. However, MS NYITRAI may retain any rents she actually collected between January 2, 2012 and August 20th, 2012. All rents due and paid on 1917 33rd Ave. shall belong to KATALIN NYITRAI up to the date of closing on said property. JEREMY GOODSON shall be entitled to, and take what steps he deems necessary to, collect any as yet unpaid rents falling due after January 1st, 2012 not previously received by KATALIN NYITRAI on the original three parcels.

5. KATALIN NYITRAI will transfer to JEREMY GOODSON all security deposits on all four properties upon closing.

6. If KATALIN NYITRAI refused or fails to cooperate in the fulfillment of this Settlement, by executing the necessary documents and transferring deposit, COWLITZ COUNTY TITLE COMPANY

is directed to complete closing and quiet title in JEREMY GOODSON on all four properties, and crediting payments due from MS NYITRAI against purchaser's future note payments as provided in the April 6th, 2012 order. In other words, the terms of the April 6th, 2012 order apply to all four properties, including 1917 33rd Avenue, except as modified by #1 above.

II. ORDER

Now, therefore; It is ORDERED that:

1. The terms of the settlement above are approved.

2. The property commonly known as 1917 33rd Avenue in Cowlitz County, Washington, and more fully described on the attached legal description, shall transfer from KATALIN NYITRAI to JEREMY GOODSON, pursuant to paragraphs 1.2 and 3 above. Title is quieted in JEREMY GOODSON, to said property.

3. This matter is dismissed, with prejudice, but with costs to Plaintiff, except attorneys fees. However, since there are matters as yet to be performed pursuant to the Settlement, any disputes regarding this Settlement and Order and its aftermath, may be brought before this Court for resolution and, if a party has not acted in good faith, reasonable attorney fees may be assessed.

CP 85-89.

On October 17, 2012, Attorney Michael Schein from Seattle filed a Notice of Appeal on behalf of Nyitrai as her attorney on appeal. CP 81-87. *See* Clerk's Papers from 44154-3-II, pages 81-87. On November 29, 2012, this court noted its own motion to determine the appealability of the trial court's order of September 18, 2012. *See* Motion to Determine Appealability. The parties thereafter filed replies to the court's motion. *See* Responses by Parties. By order entered January 8, 2013, Commissioner

Schmidt determined that Nyitrai had established that the written settlement agreement the trial court signed was a final order from which Nyitrai had an appeal as of right under RAP 2.2. *See* Order of Commissioner Schmidt dated January 8, 2013.

By February of 2013, Nyitrai had obtained new counsel at the trial court level who filed a Motion for Relief from Judgment seeking to vacate the order of April 18, 2012. CP 90-94. Her new trial attorney also filed a second Motion and Declaration to set aside the order Judge Bashor signed on September 18, 2012. RP 100-112. These motions and affidavits made a number of factual allegations claiming that the written order had been entered without input from Nyitrai trial counsel and that it failed to set out the agreement the parties had orally entered on the original trial date. *Id.* On July 1, 2013, the trial court entered an order denying the Motions to Vacate, holding as follows:

> Defendant's motion is denied. The order sought to be vacated is now on appeal. The Superior Court lacks the authority to alter an order on appeal. RAP 7.3.

CP 119-120.

Nyitrai then filed a timely Motion for Reconsideration of this ruling, arguing that under RAP 7.2, the trial court did have authority to enter a proposed ruling on the motions. CP 121-142. By order entered August 7, 2013, the trial court denied Nyitrai's Motion for Reconsideration. CP 155-

156. Nyitrai, through a new appellate attorney, thereafter filed a second Notice of Appeal in this case. CP 157-162. By subsequent order this court granted Nyitrai's motion to consolidate both appeals. *See* Ruling Consolidating Appeals.

ARGUMENT

I. THE TRIAL COURT VIOLATED CR 2A AND ACTED WITHOUT AUTHORITY WHEN IT SIGNED A WRITTEN "AGREED" ORDER OF SETTLEMENT THAT DID NOT BEAR THE SIGNATURE OF THE DEFENDANT OR HER ATTORNEY.

Civil Rule CR 2A governs a court's authority to acknowledge or enforce agreements entered by opposing parties in a civil suit. This rule states:

> No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

CR 2A.

The purpose of this rule is to avoid disputes and to give certainty and finality to settlements when they are made. *Condon v. Condon,* 177 Wn.2d 150, 298 P.3d 86 (2013). The party moving to enforce a settlement agreement has the burden of proving there is no genuine dispute as to the material terms of the agreement. *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 994 P.2d 911 (2000). The court's review and settlement agreement de novo. Lavigne v. Green, 106 Wn.App. 12, 16, 23 P.3d 515 (2001). If the moving party meets its burden, "the nonmoving party must respond with affidavits, declarations, or other evidence to show there is a genuine issue of material fact." *Patterson v. Taylor*, 93 Wn.App. 579, 584, 969 P.2d 1106 (1999) .

Finally, unsigned written settlement agreements are generally not enforceable. *Bryant v. Palmer Coking Coal Co.*, 67 Wn.App. 176, 179, 834 P.2d 662 (1992).

For example, in *Long v. Harrold*, 76 Wn.App. 317, 884 P.2d 934 (1994), a property owner filed a complaint for injunctive relief against two defendants seeking an order enjoining them from coming on her property to obtain water. After the lawsuit was filed the parties entered into negotiations seeking to settle the dispute. Defendants' attorney later filed an affidavit claiming that the parties had indeed come to an oral agreement, which he stated they agreed would later be reduced to a written agreement and judgment. The defendants' attorney then drafted a proposed stipulated agreement and judgment, which he proffered to plaintiff for her signature. Prior to signing, plaintiff sent the proposed agreement to an attorney by the name of Baechler for review. This attorney later sent a letter to the defendants' attorney indicating that while the proposed stipulated agreement appeared to correctly memorialize the oral agreement of the parties, he had not yet been retained by plaintiff to represent her. Neither he nor plaintiff signed the document.

Defendants eventually filed a motion for entry of the proposed stipulated agreement and judgment, noted the motion for hearing on the court's civil docket and provided proof of service. Neither plaintiff nor an

attorney representing her appeared at the hearing on the motion. Even though plaintiff's signature did not appear on the stipulated agreement, the court signed and entered it. When defendants later attempted to enforce the agreement plaintiff responded with a motion to vacate. The trial court denied the motion and plaintiff then sought reconsideration, arguing for the first time that under CR 2A the trial court did not have the authority to sign and enter the stipulated agreement and judgment because she neither signed the document nor appeared in court to indicate her acquiescence to it.

The defendants responded with three arguments: (1) that CR 60 precluded her argument made under CR 2A as part of her motion for reconsideration because she first made it more than one year after entry of the order she disputed, (2) that since the trial court had both *in personam* jurisdiction over the parties and subject matter jurisdiction over the substance of the suit the order the court signed was valid, and (3) that Attorney Baechler's letter to defendants' attorney qualified as written assent to the proposed stipulation and agreement. The trial court ultimately sided with the defendants and denied plaintiff's motion to vacate. Plaintiff thereafter appealed, renewing her arguments that the agreement that the trial court violated CR 2A and acted without authority when it refused to vacate the agreement and order because plaintiff neither signed it nor appeared in court to acknowledge it.

In addressing this issue on appeal the court first rejected defendants' CR 60 argument by noting that if it ultimately determined that the trial court had entered the order without authority, plaintiff's failure to challenge it within a year of its entry was not fatal to her argument. The court noted:

> Under CR 60(b)(5), a court may vacate a void judgment at any time. A judgment is void if entered by a court without jurisdiction of the parties or subject matter, or if entered by a court "which lacks the inherent power to make or enter the particular order involved" *In re Marriage of Ortiz*, 108 Wn.2d 643, 649, 740 P.2d 843 (1987) (quoting from *Dike v. Dike*, 75 Wn.2d 1, 7, 448 P.2d 490 (1968)).

Long v. Harrold, 76 Wn.App at 319.

Implicit within this holding is the court's recognition that a trial court that signs a stipulated agreement and order in violation of CR 2A necessarily "lacks the inherent power to make or enter" that agreement and order. The appellate court then went on to address the validity of plaintiff's argument that under CR 2A the trial court entered the agreement without authority to do so. The court held:

> CR 2A provides the authority for entry of a stipulated settlement and judgment. For entry of a settlement agreement as a judgment the rule requires either a written agreement signed by the parties or the parties' assent to the agreement in open court on the record. . . .
>
> Here, the settlement agreement was not signed by Ms. Long. The letter from attorney Baechler is not the equivalent of a memorial of the agreement. It did not contain the material terms of the alleged settlement. Moreover, Mr. Baechler made it clear he had not agreed to represent Ms. Long. Absent a signed agreement, CR 2A requires assent of the parties on the record in open court. Ms. Long did not do so.

> Since the prerequisites of CR 2A were not met, the court had no authority to enter the agreement as a judgment. See *Bryant v. Palmer Coking Coal Co.*, 67 Wash.App. 176, 179, 834 P.2d 662 (1992) (unsigned settlement agreement not enforceable because it was not stipulated to on the record). Therefore, the judgment was void. The court erred when it denied Ms. Long's motion to vacate.

Long v. Harrold, 76 Wn.App at 319-320.

As the following explains, the controlling facts in *Long* mirror those in the case at bar. First, in *Long* the parties entered into an oral agreement which they contemplated later reducing to writing. So in the case at bar the parties stated in court that they had entered into an agreement on the day of trial. Second, in *Long* one party's attorney reduced the oral agreement into a written document, which the opposing party refused to sign. So in the case at bar Goodson's attorney reduced the oral agreement into a written document, which both Nyitrai and her attorney refused to sign. Third, in *Long* the party who had drafted the proposed written agreement put the matter on for a hearing and properly served the opposing party. So in the case at bar Goodson's attorney noted the case for hearing and properly served Nyitrai's attorney. Fourth in *Long* the opposing party failed to appear at that hearing and the court signed the proposed order in spite of the fact that the opposing party had not signed the document. So in the case at bar both Nyitrai and her attorney failed to appear at the hearing and the court signed the proposed order in spite of the fact that neither Nyitrai nor her attorney's

signature appeared on that document. Thus, in the same manner that the court in *Long* exceeded its authority when it signed the proposed written settlement agreement which did not bear the opposing party's signature, so in the case at bar the trial court exceed its authority when it signed the proposed written settlement agreement which bore neither Nyitrai nor her attorney's signature.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ENTERED AN "AGREED" ORDER OF SETTLEMENT THAT DID NOT CORRECTLY STATE THE SUBSTANCE OF THE PRIOR AGREEMENT.

Although written agreements resolving disputed cases are not valid unless signed or acknowledged by both parties, oral agreements entered on the record in court are enforceable under CR 2A if they are "assented to in open court on the record, or entered in the minutes." *Bryant v. Palmer Coking Coal Co., supra.* However, if one party to the proposed agreement disputes its terms and raises a material fact in support of that dispute, the trial court must hold an evidentiary hearing to determine the disputed facts and determine whether or not an agreement was actually entered. *See Lavigne v. Green*, 106 Wn.App. 12, 23 P.3d 515 (2001).

In the case at bar one of the primary issues Nyitrai raised in her motion for reconsideration from the trial court's decision denying her motion to vacate the written agreement and order was that the document materially

altered any putative oral agreement entered in open court on August 20, 2012. The following lists those material changes.

Initially on August 20, 2012, the parties informed the court that they had entered into an agreement that would include Nyitrai's sale of a fourth property to Goodson personally. Although Goodson's attorney outlined the terms of the sale, Nyitrai's attorney was specific on the record that under the agreement he and not Goodson's attorney would draft all of the documents required for the sale of the fourth property. RP 4-5. Goodson's attorney responded that he would agree to this proposal. RP 5. This exchange went as follows:

> MR. HARKER: A couple of other things, our – our office will turn around the documents for the fourth property as well as have a review done.
>
> MR. HOFFMAN: Yes. (Inaudible)?
>
> MR. HARKER: This – so I was saying our office will prepare the documents for the fourth property as well as have the review of the other documents that have been prepared and get comments, or any request for modifications to you guys within, let's just say, 72 hours just to be safe. Closing no later than 30 days from that day.
>
> MR. HOFFMAN: Okay, that's fine.

CP 4-5.

By including the terms of the sale of the fourth property in the proposed written agreement Goodson's attorney did that which was prohibited under the putative oral agreement. Thus, by signing that written

settlement agreement, the trial court was not putting into written effect the oral agreement of the parties on August 20, 2013. Thus, the court exceeded its authority

In addition, as concerned the original three properties, the substance of the putative oral agreement entered on the record was that the parties would stipulate to the substance of the prior default order being entered as the agreement of the parties with the exception of dropping the order for attorney's fees. This exchange went as follows:

> MR. HOFFMAN: Your Honor, the parties have agreed to settle the case and I'll be in trial today. On the terms, as I understand, we are going to follow the order, we're going to basically reinstate the order of default and judgment that was entered on April 6th, 2012 of this year. Except that the attorneys fee award, will be – will not be included.
>
> JUDGE BASHOR: Okay.
>
> MR. HOFFMAN: The parties have settled this, the parties will recover their own – their own – their own legal fees.
>
> JUDGE BASHOR: Let me get to that and make – make sure.
>
> MR. HOFFMAN: So the terms of this order were fashioned with the assistance of Cowlitz County Title Company, they have structured closing based on this order, and we would like to minimize their difficulty by letting them continue with – with what they have set up here.
>
> JUDGE BASHOR: I see. All right.

RP 1-2.

In spite of this statement on the record, the written settlement

agreement the court signed in this case varied materially and significantly from both the default order in five areas. The following sets out each of these five variances.

First, paragraph (1)(b) of the written settlement agreement stated:

> b. Payments and interest under all the three notes shall begin commensurate with the closing of 1917 33rd Ave. below.

CP 86.

The order of default entered on April 6, 2012, does not include this provision. In fact, the idea of including the property at 1917 33rd Ave. in the dispute did not even arise until the hearing on August 20, 2012. Further, no such provision was included in the oral discussion on the record at that latter date. Thus, even if the trial court did have authority to enter some type of written order memorializing the alleged agreement from April 6th, it did not have the authority to include this provision.

Second, paragraph 4 of the written settlement agreement provides as follows:

> 4. Rents have been accumulating on the three properties subject to the April 6th, 2012 order. These rents should have gone to JEREMY GOODSON had closing taken place on December 31st, 2011 as originally agreed and, in any event, subject to April 6th, 2012. JEREMY GOODSON is entitled to all rents collected by Sharp Property Management. However, MS NYITRAI may retain any rents she actually collected between January 2, 2012 and August 20th, 2012. All rents due and paid on 1917 33rd Ave. shall belong to KATALIN NYITRAI up to the date of closing on said property. JEREMY GOODSON shall be entitled to, and take what steps he deems

necessary to, collect any as yet unpaid rents falling due after January 1st, 2012 not previously received by KATALIN NYITRAI on the original three parcels.

CP 86-87.

By contrast, the default order entered on April 6th says nothing about accumulating rents on the three properties or their retention or distribution. Neither was their any mention of this issue during the hearing on August 20th. Thus, even if the trial court did have authority to enter some type of written settlement agreement in spite of the lack of Nyitrai or her attorney's signatures, the court did not have authority to include this new provision in it.

Third, paragraph 5 of the written settlement agreement provides as follows:

5. KATALIN NYITRAI will transfer to JEREMY GOODSON all security deposits on all four properties upon closing.

CP 87.

As with the preceding paragraph in the settlement agreement, there is no provision in either the default order or the discussion on the record on August 20th about the transfer of any security deposits on either the original three properties or the new property. Thus, there was no authority under CR 2A for the court to sign an order that included this provision.

Fourth, paragraph (6) of the settlement agreement stated the following

concerning the execution of the proposed settlement:

> 6. If KATALIN NYITRAI refused or fails to cooperate in the fulfillment of this Settlement, by executing the necessary documents and transferring deposit, COWLITZ COUNTY TITLE COMPANY is directed to complete closing and quite title in JEREMY GOODSON on all four properties, and crediting payments due from MS NYITRAI against purchaser's future note payments as provided in the April 6th, 2012 order. In other words, the terms of the April 6th, 2012 order apply to all four properties, including 1917 33rd Avenue, except as modified by #1 above.

CP 87.

As with paragraphs (1)(b), (4) and (5), the prior default order stated nothing about the terms of the April 6th agreement applying to the fourth property at 1917 33rd Avenue. Neither was any discussion of such a requirement made during the August 20th hearing. Thus, the trial court acted without authority when it entered a written, unsigned settlement agreement that included these terms.

Fifth, the last paragraph of the written settlement agreement stated the following about future attorney's fees:

> 3. . . . any disputes regarding this Settlement and Order and its aftermath, may be brought before this Court for resolution and, if a party has not acted in good faith, reasonable attorney fees may be assessed.

CP 88.

The default order entered April 6, 2012, says nothing about allowing attorney's fees should a party seek future enforcement. In addition, the only

statements about attorney's fees from the August 20th hearing involved both parties stating that each side would be responsible for their own attorney's fees. Thus, to the extent the trial court generally had the authority to enter a written settlement agreement without Nyitrai's signature or assent, it exceeded that authority by including this provision.

In making this argument Nyitrai does not agree that the trial court had the authority to enter any written settlement agreement without either her or her attorney's signature. *See* Argument I and Argument III. Neither does she stipulate or agree that the statements made on the record on August 20, 2012, constitute an oral settlement under CR 2A. Indeed, the sole issue before this court is the validity of the written Settlement Agreement the court signed on September 18, 2012, not the existence, validity or scope of what happened in court on August 20, 2012. Rather, what Nyitrai argues in this section of her brief is that to the extent it could be found that the trial court did have authority to enter the written settlement agreement, it did not have authority to include terms not included in the prior default order or the oral statements of August 20, 2012.

III. THE AGREED ORDER OF SETTLEMENT VIOLATED THE STATUTE OF FRAUDS AND IS VOID BECAUSE BY ITS TERMS IT COULD NOT BE PERFORMED IN ONE YEAR AND IT DID NOT BEAR THE SIGNATURE OF EITHER THE APPELLANT OR HER ATTORNEY.

Under RCW 19.36.010 there are five types of agreements, contracts and promises which are void unless they are in writing and signed by the party thereto or that party's legal representative. *See* RCW 19.36.010. The first section of this provision states:

> In the following cases, specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him or her lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof;

RCW 19.36.010(1).

While the first provision of this statute voids oral agreements that cannot be performed in one year, it also voids oral agreements to reduce to writing an agreement which, by its terms, cannot be performed in one year. *Building Serv. Employees Int'l Union, Lodge 6 v. Seattle Hosp. Council*, 18 Wn.2d 186, 138 P.2d 891 (1943); 72 Am.Jur.2d, Statute of Frauds, § 4, p. 568 (1974).

For example, in *Klinke v. Famous Recipe Fried Chicken, Inc.*, 24 Wn.App. 202, 600 P.2d 1034 (1979), the plaintiff entered an oral agreement whereby he promised to move to Washington and find and develop a suitable

site for one of Defendant's Famous Recipe Fried Chicken restaurants. In return, the defendant agreed to apply for licensing in Washington to sell franchises and to then sell the plaintiff a ten year franchise after the state licensing was secured. Plaintiff then moved to Washington and spent considerable time and money finding and developing a suitable site. At the same time Defendant began the process of obtaining a license to sell franchises in Washington. However, Defendant later changed its mind, withdrew its licensing application and informed Plaintiff that it would not be selling restaurant franchises in Washington State. Plaintiff then brought suit for breach of contract.

After suit was filed defendant moved for summary judgment arguing that since no written contract had been signed, its agreement with plaintiff was void under RCW 19.36.010(1). Specifically, defendant argued that since the agreement could not be performed in one year it was void under the statute of frauds. Plaintiff responded in part by arguing that since the parties had agreed to reduce the oral agreement to writing, and since that agreement could be performed in less than one year, that agreement did not fall within the purview of the statute of frauds even though its ultimate terms required performance in a time span exceeding one year. Thus, plaintiff argued that the oral agreement did not fall under the prohibition found in the first section of the statute of frauds. The trial court disagreed with plaintiff's position and

granted summary judgment to defendants. Plaintiffs appealed, renewing its argument that the oral agreement did not fall within the statute of frauds.

Although the court did ultimately reverse upon equitable grounds, it none the less rejected plaintiff's argument on the application of the statute of frauds. The court noted as follows on plaintiff's statute of frauds argument:

> The general rule is that a verbal agreement to put in writing a contract which will require more than a year to be performed is within the statute of frauds and thus unenforceable. It is undisputed that [plaintiff's] agreement with [defendant] was verbal and called for the eventual execution of a 10-year franchise, thus bringing it within the prohibition of the statute.

Klinke v. Famous Recipe Fried Chicken, Inc., 24 Wn.App. at 205.

In the case at bar Goodson argued to the trial court that it should enter the proposed written settlement agreement because it embodied an oral settlement that Goodson claimed had been made with Nyitrai on the record on August 20, 2012. While the reduction of the alleged settlement to writing could undoubtedly have been performed in less than one year, the fact remains that in this case, as in *Klinke*, the operative terms of the alleged agreement could not be performed within one year. In *Klinke* the agreement called for performance over 10 years. In the case at bar the alleged agreement called for performance over 5 years. Thus the agreement in the case at bar was subject to the statute of frauds.

In *Klinke* the defect that triggered the application of the statute of

frauds was the failure to put the agreement into writing. While this defect did not exist in the case at bar, given the court's entry of the written settlement order, the contract was still void under the statute of frauds because it was not "signed by the party to be charged therewith, or by some person thereunto by him or her lawfully authorized." Thus, in the case at bar the written settlement agreement was void because it violated the statute of frauds.

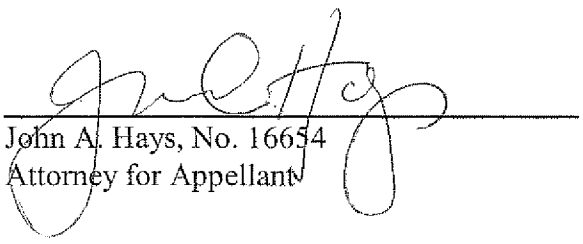
In making this argument it should be noted that there were two separate and distinct parts to the document the court entered on September 18, 2012. The first part is the "settlement agreement" which allegedly memorializes an agreement of the parties. The second part of the document is an order of the court. In this case Nyitrai does not argue that an order of a court taken with proper authority would necessarily be subject to the statute of frauds. By its terms RCW 19.36.010 only applies to an "agreement, contract , or promise, or some note or memorandum." However, it does specifically apply to "agreements." In the case at bar Goodson alleged that its proposed written agreement embodied the terms of the prior oral agreement. Thus, the first part of the document entitled "settlement agreement," is indeed an "agreement" under application of the statute of frauds. As a result, the lack of Nyitrai or her attorney's signature on it voids the agreement. Consequently, this court should rule that the document the court signed on September 18, 2012, is void.

CONCLUSION

The trial court exceeded its authority under CR 2A when it (1) signed a proposed settlement agreement that did not bear the signature of either Nyitrai or her attorney, and (2) signed a proposed settlement agreement that did not accurately memorialize the terms of the purported oral agreement. In addition, the document was void because it violated the statute of frauds.

DATED this 26th day of November, 2013.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

CR 2A

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

RCW 19.36.010
Contracts, Etc., Void Unless in Writing

In the following cases, specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him or her lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof; (2) every special promise to answer for the debt, default, or misdoings of another person; (3) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry; (4) every special promise made by an executor or administrator to answer damages out of his or her own estate; (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

Jeremy Goodson, **dba Goodson Properties,** **Respondent,** **vs.** **Katalin K. Nyitrai,** **Appellant.**	**NO. 44154-3-II** **AFFIRMATION OF SERVICE**

Donna Baker, states the following under penalty of perjury under the laws of Washington State. On the November 26, 2013, I personally e-filed or placed in the United States Mail the following documents with postage paid to the indicated parties:

BRIEF OF APPELLANT

1. Katalin K. Nyitrai
   2307 Cascade Way
   Longview, WA. 98632

2. Sue Baur
   County Prosecuting Attorney
   312 SW 1st Ave.
   Kelso, WA. 98626

Dated this November 26, 2013, at Longview, WA. , Washington.

Donna Baker

HAYS LAW OFFICE

November 26, 2013 - 9:50 AM

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Case Name: Jeremy Goddson, dba Goodson Properties vs. Katalin K. Nyitrai

Court of Appeals Case Number: 44154-3

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Jeremy Goodson, dba Goodson Properties vs. Katalin K. Nyitrai

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A copy of this document has been emailed to the following addresses:

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

Jeremy Goodson, **dba Goodson Properties,** **Respondent,** **vs.** **Katalin K. Nyitrai,** **Appellant.**	**NO. 44154-3-II** **AMENDED AFFIRMATION OF SERVICE**

Donna Baker, states the following under penalty of perjury under the laws of Washington State. On the November 26, 2013, I personally e-filed or placed in the United States Mail the following documents with postage paid to the indicated parties:

BRIEF OF APPELLANT

1. Katalin K. Nyitrai
   2307 Cascade Way
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2. Kenneth V. Hoffman
   Attorney at Law
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   Vancouver, WA. 98661

Dated this December 09, 2013, at Longview, WA. , Washington.

Donna Baker

HAYS LAW OFFICE

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Comments:

Amended Affirmation of Service stating that I e-filed the Brief of Appellant to Mr. Kenneth V. Hoffman and not Sue Baur as stated on an earlier Affirmation of Service dated 11-26-13.

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